

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

B & S HOLDINGS, LLC, a
Washington limited liability company,

NO: 12-CV-0387-TOR

ORDER ON MOTION TO REMAND
AND MOTION TO DISMISS

BNSF RAILWAY COMPANY, a
Delaware corporation, et al.,

Defendant.

BEFORE THE COURT are Plaintiff's Motion to Remand, ECF No. 3, and

Defendant BNSF Railway Company's Motion to Dismiss, ECF No. 10. The

motions were heard without oral argument on August 6, 2012. The Court has

reviewed the motions, the responses, the reply and supporting documentation and

is fully informed.

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1 BACKGROUND

2 B & S Holdings, LLC (“B & S Holdings”) brought this suit against BNSF
3 Railway Company (“BNSF”), and others, seeking to obtain fee simple title to part
4 of BNSF’s property that it owns in fee simple along its rail line located in
5 Wenatchee, Washington. ECF No. 1. BNSF removed this action to federal court
6 on the basis of federal question jurisdiction. ECF No. 1 at 2. No other party has
7 yet appeared. B & S Holdings has now moved for an order remanding this case
8 back to the Chelan County Superior Court for the State of Washington on the
9 grounds that no federal question is presented. BNSF cross moves for dismissal on
10 the ground that exclusive jurisdiction resides with the Surface Transportation
11 Board under the express terms of a federal statute.

12 According to the complaint, B & S Holdings owned certain property
13 adjoining property owned by BNSF in Chelan County, Washington. ECF 1-1 at
14 18-19. On March 8, 2012, B & S Holdings sold its property to the Wenatchee
15 School District No. 246. *Id.* B & S Holdings contends that its formerly owned
16 building and fenced parking area encroach on the adjacent BNSF property. *Id.* at
17 20. B & S Holdings claims that it has established adverse possession of this
18 property by reason of its encroachment and seeks quiet title to the same for the
19 benefit of its successor in interest, Wenatchee School District No. 246. *Id.* at 20-
20 21.

DISCUSSION

The question before the Court is whether removal of this action to this Court was valid due to the complete preemption of Plaintiff's state law adverse possession cause of action under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub.L. No. 104-88, 109 Stat. 803. In the alternative, the Court must decide whether there is diversity jurisdiction over the plaintiff's state adverse possession claim which would support the removal of this action. Finally, if the Court has jurisdiction, the Court must then decide whether it should yield to the Surface Transportation Board to decide the underlying controversy.

I. REMOVAL

A defendant may remove an action to federal court based on federal question jurisdiction or diversity jurisdiction. 28 U.S.C. § 1441. However, "[i]t is to be presumed that a cause lies outside [the] limited jurisdiction [of the federal courts] and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)) (alterations in original). The "strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper," and the court resolves all ambiguity in favor of remand to state

1 court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam) (internal
 2 quotation marks omitted).

3 A. FEDERAL QUESTION

4 The threshold requirement for removal under 28 U.S.C. § 1441 is a finding
 5 that the complaint contains a cause of action that is within the original jurisdiction
 6 of the district court. *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 861 (9th
 7 Cir. 2003) (*quoting Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir.1998)). In
 8 determining federal question jurisdiction, the well-pleaded complaint rule provides
 9 that federal jurisdiction exists only when a federal question is presented on the face
 10 of the plaintiff's properly pleaded complaint. The plaintiff is the master of his
 11 complaint and may avoid federal question jurisdiction by relying exclusively on
 12 state law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

13 “A case ‘arises under’ federal law within the meaning of § 1331 ... if ‘a well-
 14 pleaded complaint establishes either that federal law creates the cause of action or
 15 that the plaintiff's right to relief necessarily depends on resolution of a substantial
 16 question of federal law.’” *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547
 17 U.S. 677, 689–90 (2006) (*quoting Franchise Tax Bd. of Cal. v. Constr. Laborers
 18 Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28 (1983) (brackets omitted)). It is
 19 settled law that a case may not be removed to federal court on the basis of a federal
 20 defense, including the defense of preemption, even if the defense is anticipated in

1 the plaintiff's complaint, and even if both parties admit that the defense is the only
 2 question truly at issue in the case. *Hunter v. Philip Morris USA*, 582 F.3d 1039,
 3 1042 -1043 (9th Cir. 2009) (internal quotation marks and citations omitted); *see*
 4 *also Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463
 5 U.S. at 14 (“since 1887 it has been settled law that a case may not be removed to
 6 federal court on the basis of a federal defense, including the defense of
 7 preemption.”).

8 One exception to the statutory “well-pleaded complaint” rule is when
 9 Congress “so completely pre-empt[s] a particular area that any civil complaint
 10 raising this select group of claims is necessarily federal in character.”
 11 *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987); *see also Avco*
 12 *Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968).
 13 Under complete preemption, if “the pre-emptive force of a [federal] statute is so
 14 ‘extraordinary’ that it ‘converts an ordinary state common-law complaint into one
 15 stating a federal claim for purposes of the well-pleaded complaint rule,’” then “any
 16 claim purportedly based on that pre-empted state law is considered, from its
 17 inception, a federal claim, and therefore arises under federal law.” *Caterpillar*, 482
 18 U.S. at 393.

19 The question in complete preemption analysis is whether Congress
 20 intended the federal cause of action to be the exclusive cause of action
 for the particular claims asserted under state law.” *[New Orleans &*
Gulf Coast Ry. Co. v.] Barrois, 533 F.3d [321,] [] 331; *see also*

1 *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S.Ct. 2058, 156
 2 L.Ed.2d 1 (2003).

3 *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011). Here,
 4 Plaintiff's complaint relies exclusively on state property law, specifically,
 5 Washington State's adverse possession law. Accordingly, if not for diversity
 6 jurisdiction, discussed infra, only complete preemption can provide federal
 7 jurisdiction sufficient to support removal in this case.

8 The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), which, as
 9 amended, still governs federal regulation of railroads, has been recognized as
 10 "among the most pervasive and comprehensive of federal regulatory schemes."
 11 *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (*citing Chi. &*

12 *N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). For more
 13 than a century, the Supreme Court has made it clear that under the U.S.
 14 Constitution's Supremacy Clause (Art. VI, cl. 2), state laws or regulations that are
 15 inconsistent with the agency's plenary authority or with the Congressional policy
 16 reflected in the Interstate Commerce Act are preempted. *See id.*

17 The jurisdiction of the [Surface Transportation] Board over--

18 (1) transportation by rail carriers, and the remedies provided in
 19 this part with respect to rates, classifications, rules
 20 (including car service, interchange, and other operating
 21 rules), practices, routes, services, and facilities of such
 22 carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (emphasis added).

As the agency authorized by Congress to administer the [ICCTA], the Transportation Board is uniquely qualified to determine whether state law should be preempted by the [ICCTA].” *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (alterations in original) (quoting *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005)).

New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 331 -332 (5th Cir. 2008).

There is no Ninth Circuit precedent on the issue of whether complete preemption exists under the ICCTA in the context of state law adverse possession claims to railroad property. However, the Ninth Circuit does provide a test for determining what weight to give the Surface Transportation Board's interpretation of statutes it administers:

Congress gave the Board primary authority for enforcement of the Interstate Commerce Act. *Fulfillment Servs., Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 616–17 (9th Cir. 2008). “Where there is a challenge to the agency’s interpretation of the statute that it administers, we apply the analytical framework set forth in *Chevron* [.]” *DHX, Inc. v. Surface Transp. Bd.*, 501 F.3d 1080, 1086 (9th Cir.

1 2007) (internal citation omitted). ““If the intent of Congress is clear ...
 2 [we] must give effect to the unambiguously expressed intent of
 3 Congress.”” *Id. (quoting Chevron, U.S.A., Inc. v. Natural Resources*
4 Defense Council, Inc., 467 U.S. 837, 842–44, 104 S.Ct. 2778, 2781–
5 82, 81 L.Ed.2d 694 (1984)). “If however, the meaning of the statute is
6 ambiguous, ‘the question for the court is whether the agency's answer
7 is based on a permissible construction of the statute.’” *Id. (quoting*
8 *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782). “[T]he court does not
9 simply impose its own construction on the statute....” *Id. (quoting*
10 *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782).

11 *Pacific Indem. Co. v. Atlas Van Lines, Inc.*, 642 F.3d 702, 708-09 (9th Cir. 2011);
 12 see also *Association of American Railroads v. South Coast Air Quality*
13 Management Dist., 622 F.3d 1094, 1097 (9th Cir. 2010) (“We find further
 14 guidance on the scope of ICCTA preemption from the decisions of the Surface
 15 Transportation Board (“STB”), to which we owe *Chevron* deference, *DHX*, 501
16 F.3d at 1086, and from decisions of our sister circuits.”).

17 The Surface Transportation Board recently clarified its position with respect
 18 to adverse possession causes of action. *Jie Ao and Xin Zhou – Petition for*
19 Declaratory Order, FD 35539, 2012 WL 2047726 (STB served June 6, 2012).
 20 Interestingly, the Surface Transportation Board decided a Washington State
 21 adverse possession claim concerning a certain parcel D.

22 With regard to Parcel D, we find that Petitioners' state law adverse
 23 possession claim is federally preempted, regardless of whether this
 24 case is analyzed as “categorical” preemption (preemption that occurs
 25 when a state or local regulation is preempted on its face), or as “as
 26 applied” preemption (based on the degree of interference that a
 27 particular action would have on railroad transportation).

1 *Id* at *1. The Board reasoned:

2 Ao-Zhou's approach to preemption would permit landowners to carve
3 off strips of railroad ROW [right of way] all over the country for non-
4 rail use, even though the Board has not authorized the ROW to be
5 permanently removed from the nation's rail system under Title 49.
That untenable result would undermine interstate commerce and the
strong federal policy in favor of retaining rail property in the national
rail network, where possible.

6 *Id.* at *7.

7 Section 10501(b) thus preempts other regulation that would
8 unreasonably interfere with railroad operations that come within the
9 Board's jurisdiction, without regard to whether or not the Board
10 actively regulates the particular activity involved. The statute defines
11 rail transportation expansively to encompass any property, facility,
12 structure or equipment "related to the movement of passengers or
13 property, or both, by rail, regardless of ownership or an agreement
14 concerning use." 49 U.S.C. § 10102(9). Moreover, 49 U.S.C. §
10102(6) defines "railroad" broadly to include track, terminal facility,
ground, etc., used or necessary for transportation. The Board has
interpreted state or local regulation to include state property law
claims brought by non-governmental entities, where such claims
would have the effect of interfering with railroad operations. *Mid-*
America Locomotive and Car Repair, Inc.—Petition for Declaratory
Order, FD 34599 (STB served June 6, 2005).

15 *Id.* at *4.

16 In contrast to adverse possession claims, which would permanently strip the
17 railroads of the real property they rely upon to engage in interstate commerce and
18 conduct their business, the Surface Transportation Board declared that certain state
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1 and local actions would not be preempted on their face as long as they did not
2 prevent or unreasonably interfere with rail transportation.¹ *Id.*

3 While § 10501(b) is broad and far-reaching, there are, of course,
4 limits. For example, § 10501(b) preemption does not apply to state or
5 local actions under their retained police powers, as long as they do not
6 interfere with railroad operations or the Board's regulatory programs.

7 *Id.*

8 ¹ One recent Fifth Circuit decision has applied this type of “as applied” fact
9 specific analysis, even in the context of complete preemption. *Elam v. K.C.S. Ry.*
10 *Co.*, 635 F.3d 796 (5th Cir. 2011); *but see Franks Investment Company LLC v.*
11 *Union Pacific R.R. Co.*, 593 F.3d 404, 408 (5th Cir. 2010)(en banc) (applying the
12 same “as applied” analysis, but emphasizing it was only in the context of ordinary
13 preemption, not complete preemption). The *Elam* court found, based on legislative
14 intent, that the ICCTA completely preempts state laws that “directly attempt to
15 manage or govern a railroad’s decisions in the economic realm” *Id.* at 807. In
16 contrast, the ICCTA did not expressly preempt applicable state laws that had a
17 “mere remote or incidental effect on rail transportation.” *Id.* at 813. This type of
18 analytical framework, when applied to the facts of this case, also supports a finding
19 of complete preemption, as the grant of fee simple title would certainly have more
20 than a remote effect on rail transportation.

1 For state or local actions that are not preempted on their face,
 2 § 10501(b) preemption analysis requires a factual assessment of
 3 whether that action would have the effect of preventing or
 4 unreasonably interfering with rail transportation. *See Franks Inv. Co.*
v. Union Pac. R.R., 593 F.3d 404, 414 (5th Cir. 2010) (en banc).
 5 Routine non-conflicting uses, such as non-exclusive easements for at-
 6 grade crossings, are not preempted, as long as they would not impede
 7 rail operations or pose undue safety risks.

8 *Id.* at *6.

9 To be sure, Congressional intent is clear and unambiguously expressed in
 10 the preemption statute giving the Surface Transportation Board exclusive authority
 11 over rail transportation, including the facilities and property to conduct such
 12 commerce: “the remedies provided under this part with respect to regulation of rail
 13 transportation *are exclusive and preempt the remedies provided under Federal or*
State law.” 49 U.S.C. § 10501(b) (emphasis added).²

14 ² It is not surprising that Congress would protect railroad property from diminution
 15 and assault by fifty states’ laws. In a not wholly dissimilar statute, the General
 16 Right-of-Way Act of 1875, 43 U.S.C. § 934, Congressional intent was deemed
 17 plainly manifest that railroads are legally incapable of alienating their right-of-way,
 18 directly or indirectly. *Boise Cascade Corp. v. Union Pacific Railroad Co.*, 454
 19 F.Supp. 531, 533 (D. Utah 1978), *affirmed* 630 F.2d 720 (10th Cir. 1980) (a right-
 20 of-way granted by Congress cannot be diminished by conveyance, or by the
 doctrines of adverse possession, abandonment or boundary by acquiescence).

1 Accordingly, the Court finds that the ICCTA completely preempts this state
2 law adverse possession cause of action because not only would it interfere with
3 railroad operations, but would divest the railroad of the very property with which it
4 conducts its operations.

B. DIVERSITY

6 BNSF also argues that removal was appropriate based on diversity of
7 citizenship pursuant to 28 U.S.C. § 1441(a), noting that the amount in controversy
8 exceeds \$75,000 and the parties are of diverse citizenship. ECF No. 11 at 16-17.
9 Federal district courts have original jurisdiction in cases where (1) the amount in
10 controversy exceeds \$75,000, exclusive of costs and interest, and (2) there exists
11 complete diversity of citizenship between the parties. 28 U.S.C. § 1332(a). When
12 the complaint does not specify a particular amount of damages, “the removing
13 defendant bears the burden of establishing, by a preponderance of the evidence,
14 that the amount in controversy” exceeds \$75,000. *Sanchez v. Monumental Life Ins.*
15 *Co.*, 102 F.3d 398, 403-404 (9th Cir. 1996). Defendants may rely on facts
16 presented in the removal petition and any “summary judgment type evidence”
17 relevant to the amount in controversy at the time of removal. *Matheson v.*
18 *Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090-91 (9th Cir. 2003)
19 (“[c]onclusory allegations as to the amount in controversy are insufficient.”).
20 Moreover, the court may consider this evidence even if it was not produced with

1 the original notice of removal. *Cohn*, 281 F.3d 837, 840 n.1 (9th Cir. 2002) (“[t]he
2 district court did not err in construing [Defendant’s] opposition as an amendment
3 to its notice of removal.”)

4 B & S Holdings only contests the amount in controversy and contends that
5 an appraisal suggests the value of the property to be only \$49,000 and that the
6 actual value to the parties was less than \$35,000, because the sales price of the
7 property was only 71 percent of the appraised value. ECF No. 15 at 5. B & S
8 Holdings admits that the property sales contract has a holdback provision of
9 \$100,000 so as to provide incentive for it to actually accomplish the quieting of
10 title. *Id.* Thus, at least based on the agreed evidence before the court, the dispute
11 is worth \$100,000 to B & S Holdings. *See In re Ford Motor Co./Citibank (South*
12 *Dakota), N.A.*, 264 F.3d 952, 958 (9th Cir. 2001) (“[u]nder the ‘either viewpoint’
13 *rule, the test for determining the amount in controversy is the pecuniary result to*
14 *either party which the judgment would directly produce.”). Moreover, valuation of*
15 *property can be determined by the diminution of the value of the remainder which*
16 *would result from the taking. *United States v. 760.807 Acres of Land, More or**
17 *Less, Situate in City and County of Honolulu, State of Hawaii*, 731 F.2d 1443,
18 1447 (9th Cir. 1984). In this case, that could be even more substantial to BNSF
19 than the \$100,000 holdback valuation is to B & S Holdings.

1 The Court finds that the amount in controversy exceeds \$75,000 and thus,
2 the Court has diversity jurisdiction over this suit.

3 **II. DISMISSAL**

4 The preemptive effect of the ICCTA was a question of first impression for
5 the Ninth Circuit in 1998. *City of Auburn v. United States*, 154 F.3d 1025, 1030
6 (9th Cir. 1998). There, the Ninth Circuit observed that all the cases cited by the
7 parties found a broad reading of Congress' preemption intent, not a narrow one and
8 concluded:

9 [G]iven the broad language of § 10501(b)(2), (granting the STB
10 exclusive jurisdiction over construction, acquisition, operation,
abandonment, or discontinuance of rail lines) the distinction between
11 "economic" and "environmental" regulation begins to blur. For if
local authorities have the ability to impose "environmental"
12 permitting regulations on the railroad, such power will in fact amount
to "economic regulation" if the carrier is prevented from constructing,
13 acquiring, operating, abandoning, or discontinuing a line.

14 We believe the congressional intent to preempt this kind of state and
local regulation of rail lines is explicit in the plain language of the
15 ICCTA and the statutory framework surrounding it. Because
congressional intent is clear, and the preemption of rail activity is a
16 valid exercise of congressional power under the Commerce Clause,
we affirm the STB's finding of federal preemption.

17 *City of Auburn*, 154 F.3d at 1031 (citation and footnote omitted).

18 Granting fee simple title to B & S Holdings in this case would
19 unquestionably prevent BNSF from constructing, acquiring, and operating its
20 facilities. Thus, whether to grant quiet title of BNSF's property under a claim of

1 adverse possession is a decision that necessarily involves the regulation of rail
2 transportation. Under the ICCTA, Congress has vested exclusive jurisdiction over
3 the regulation of rail transportation in the Surface Transportation Board.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 5 1. Plaintiff's Motion to Remand, ECF No. 3, is **DENIED**.
- 6 2. Defendant BNSF Railway Company's Motion to Dismiss, ECF No. 10, is
7 **GRANTED** with prejudice.

8 The District Court Executive is hereby directed to enter this Order, furnish
9 copies to counsel, and **CLOSE** the file.

10 **DATED** this 11th day of September, 2012.

11 *s/ Thomas O. Rice*

12 THOMAS O. RICE
13 United States District Judge

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